No. 12,262

IN THE

United States Court of Appeals

For the Ninth Circuit

CLAUDE T. LINDSAY and MARTEL WILSON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

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I. ANSWERING APPELLEE'S CONTENTION THAT THE AWARD OF THE CONTRACTING OFFICER UNDER ARTICLE 15 WAS CONCLUSIVE AND BINDING ON THE DISTRICT COURT.

Appellants respectively submit that the appellee has failed to answer appellants' opening brief. Appellee evades the issues. Appellants' action was for damages arising from breach of a written contract by appellee in failing to deliver certain fixtures on a specified date. The trial court found the execution of the contract as alleged, that appellee failed to deliver the fixtures as specified, that appellee was notified that piecemeal installation would result in increased cost but nevertheless ordered installation, and that appellants (pursuant to Article 15 of the contract which provides in case of dispute "contractor shall diligently

proceed with the work as directed") did install the fixtures piecemeal as they arrived. (See Findings I to VI, R. 12-15.)

Appellants proved their damage without dispute or challenge in the amount of $6,536.27. Despite the undisputed evidence, the trial court (erroneously construing Article 15 as an arbitration agreement) ruled that it was bound by the amount of the award of the contracting officer (to-wit, $2,696.00) in the absence of arbitrary, capricious, corrupt or partisan bias. (R. 16.)

On pages 9 to 14 of our opening brief, appellants have cited authorities which hold that Article 15 does not constitute an arbitration agreement, that the court was not bound by the contracting officer's decision, and that Article 15 of the Standard Government Contract does not give the contracting officer the conclusive power to determine a contractor's claim for damages and thus oust the District Court of such jurisdiction. The authorities above mentioned include comparatively recent decisions of the Court of Claims which support appellants' contentions in every respect.

Arthur W. Langevin v. Unied States, 100 Ct. Cls. 15 (Decided May 3, 1943);

Irwin and Leighton v. United States, 101 Ct. Cls. 455 (Decided April 3, 1944);

Schmoll v. United States, 105 Ct. Cls. 458 (Decided Feb. 4, 1946);

Anthony P. Miller, Inc. v. United States, 111 Ct. Cls. 252 (Decided May 3, 1948).

The appellee abandons the authorities cited by the trial court in support of its decision. (R. 10-11.) Appellee in disputing appellants' contentions now argues that "the Supreme Court has set at rest these contentions adversely to appellants' position" (p. 4, Brief for Appellee), citing the following Supreme Court cases:

United States v. Callahan-Walker Co., 317 U. S. 56, 87 L. Ed. 49;

United States v. Blair (1943), 321 U. S. 730, 88 L. Ed. 1039;

United States v. Holpuch Co. (1945), 328 U. S. 234, 90 L. Ed. 1192.

If, as appellee contends, the Supreme Court case of *United States v. Callahan-Walker Co.,* supra (principally relied upon), is contrary to appellants' contentions, one might wonder at the temerity of the Court of Claims to thus ignore such authority. The case of *United States v. Callahan-Walker Co.,* supra, was decided November 9, 1942, which was from approximately six months to five and one-half years prior to the Court of Claims decisions above cited, and relied upon by appellants.

We respectfully submit, however, that the Court of Claims has neither overlooked nor ignored the Supreme Court cases cited by appellee. The Supreme Court cases relied upon by appellee are not in point and give no support whatsoever for appellee's argument.

In each of the Supreme Court cases above mentioned there was a failure of plaintiffs to comply with

Article 15 and thus a failure to exhaust the administrative remedy specified in the contract before institution of court action. In the case at bar, plaintiffs fully complied with the procedure outlined in Article 15 and the court so found. (R. 15.)

There are further distinctions in the Supreme Court cases relied upon by appellee apparent from their examination which disclose that they do not in any way support the position of appellee even by implication. They do not hold (as in substance the trial court held herein) that in an action for damages arising from breach of contract, the court is bound by the decision of the contracting officer as to the amount of damages suffered (even when such decision is made without evidentiary support), in the absence of corruption or partisan bias.

In the case of *United States v. Callahan-Walker Co.,* supra, the court merely held that where pursuant to contract, changes are made in drawings or specifications, the ascertainment of the cost and reasonable allowance therefor is a question of fact, and since Article 15 was not complied with, the contractor was without standing to maintain his suit.

The case of *United States v. Blair,* supra, fails to support appellee but to the contrary supports the appellants' position. The Supreme Court ruled on several issues. It first held that the United States could not be held responsible for delays caused by another contractor on the project and not caused by the United States. Secondly, it held that the United

States could not be held for arbitrary and unreasonable acts, rulings and instructions of Government officials when the plaintiff had not first complied with Article 15 of the contract. The Supreme Court pointed out that Article 15 "provided the Government with an opportunity to mitigate or avoid damages by correcting errors or excesses of its subordinate officers". But the court also held that damages could be recovered for such conduct of Government officials where Article 15 had been complied with, and it affirmed the judgment of the Court of Claims with respect to an item where compliance with Article 15 was shown.

In *United States v. Holpuch Co.,* supra, the court held that disputes concerning footing excavations (arising out of an inconsistency between specifications and drawings) and disputes concerning wage increases constituted "a question arising under this contract" and that respondent having failed to avail itself of the administrative procedure of Article 15 was precluded from bringing suit on such matters in the Court of Claims. The decision was expressly limited:

> "The narrow question is whether a contractor's failure to exhaust the administrative appeal provisions of a government construction contract bars him from bringing suit in the Court of Claims to recover damages." (*U. S. v. Holpuch,* 328 U. S. 234, 235.)

It may be further noted that the contracts involved in the *Blair* and *Holpuch* cases are distinguishable from the one in the case at bar. In the case at bar

Article 15 is limited to "disputes concerning *questions of fact* arising under this contract" while the provisions of Article 15 in the *Blair* and *Holpuch* cases covers "disputes concerning *questions* arising under this contract."

The case of *United States v. Gleason,* 175 U. S. 588, 44 L. Ed. 284 and the other cases cited but not discussed on page 6 of appellee's brief are so patently not in point as to preclude necessity for discussion.

On page 7 of its brief, appellee cites the Court of Claims case of *B. & W. Construction Co. v. United States,* 101 Ct. Cls. 748. This decision does not support appellee, the court expressly distinguishing the question therein involved from the one involved in the case at bar:

> "but provisions leaving to the final judgment of the engineer or architect the question of whether or not there has been a breach of the contract and preventing resort to the courts for a determination of rights thereby accruing have never been upheld * * *." (101 Ct. Cls. 748, 768.)

Appellee further argues that the award does not rest upon a determination that a breach of contract had occurred and that the District Court did not "find the contract to have been breached by delay or otherwise". This is simply not true. The court found that in the contract it was provided that the defendant would furnish certain fixtures to be installed by plaintiffs, that plaintiffs should prepare a list of said fixtures and dates of delivery to the project. (R. 14, Finding IV.) With respect to breach of this obligation, the court specifically found:

"That pursuant to said provisions, plaintiffs on or about June 26, 1942, signed requisition orders requesting delivery by the defendant by August 1, 1942, of all of the items of said fixtures to be furnished by defendant under said contract. That said fixtures and equipment were not delivered by defendant by August 1, 1942, as requested by plaintiffs but actual deliveries of all said items were spread over the time from August 12, 1942, to January 22, 1943."

There was further breached by the government the implied obligation that the contract need only be performed in accord with custom and good plumbing practice in the community where the project was to be structed. (R. 14, Finding V.)

II. ANSWERING APPELLEE'S CONTENTION THAT IF THE DISTRICT COURT ERRED IN LIMITING ITS JUDGMENT TO THE AMOUNT OF THE AWARD THE APPELLATE COURT SHOULD NOT DIRECT ENTRY OF JUDGMENT IN THE AMOUNT CLAIMED BY PLAINTIFFS BUT SHOULD REMAND THE CAUSE FOR FURTHER PROCEEDINGS IN THE DISTRICT COURT.

Appeal was taken only by the plaintiffs in this case. No cross appeal was filed on behalf of the defendant. Thus the defendant may not be heard to question the correctness of the decree of the District Court, insofar as the court ordered judgment in favor of the plaintiffs in the amount of $2,696.00.

Bothwell v. United States, 254 U. S. 231, 65 L. Ed. 238.

Nor has appellee sought to do so. On a reversal, therefore, if remand were ordered for further proceedings,

without directions, such proceedings could only be had for the purpose of determining what damages in excess of said $2,696.00 should be awarded to appellants. But the uncontradicted evidence shows that appellants' damages were in the amount of $6,536.27. As pointed out in appellants' opening brief, appellee proffered no evidence contradicting the actual costs to appellants, but only evidence indicating the contracting officer's conduct was not capricious or arbitrary. Appellee reiterates again on page 13 of its brief its assertion that there was no finding or evidence of breach of contract. This is not true, as pointed out, supra herein.

Appellants have failed to show how in any way a direction to the lower court to make findings of damages on the uncontradicted testimony and enter judgment would not serve the interests of justice. Appellee does not show how a failure to make such a direction would serve any purpose other than delay. But there already appears to have been sufficient delay in this case as to afford appellee ample opportunity to investigate and defend the case.[1] The authorities cited by appellants in their opening brief show that this court has ample authority to direct findings and judgment for the amount of damages established by the uncontradicted evidence.

The authorities cited by appellee do not support its contention that further proceedings in the District

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[1]Complaint was filed *August 1, 1946;* answer was filed *January 31, 1947;* trial concluded *October 20, 1947;* judgment was entered *April 7, 1949;* printed record was furnished appellants *July 23, 1949;* appellants' opening brief was filed *September 2, 1949;* brief for appellee was filed *December 27, 1949.*

Court, other than as requested by appellants, are necessary.

The case of *Gotham Silk Hosiery Co. v. Artcraft Silk Mills,* 147 Fed. (2d) 209, involved very conflicting evidence, some of which was apparently a fraud upon the court. In the case of *Ex parte French,* 91 U. S. 423, 23 L. Ed. 429, there was a special finding of fact only, with many of the issues still untried. In the case of *United States v. Iriarte,* 166 Fed. (2d) 800, there was involved land values and no evidence had been introduced on an important factor pertaining to such values. In the case of *Slocum v. N. Y. Life Ins. Co.,* 228 U. S. 364, 57 L. Ed. 879, the case was remanded because of improper instructions to the jury which could only be cured by proper instructions to another jury.

We, therefore, respectfully request that if this court finds that the court below committed error in holding itself bound by the award of the contracting officer, that this court reverse the case with directions to the trial court to make findings and render judgment in favor of plaintiffs and against defendant in the amount of $6,536.27 in lieu of the amount of the judgment entered herein in the amount of $2,696.00.

Dated, San Francisco, California,
January 11, 1950.

Respectfully submitted,
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